New York Rehabilitation Care Management, LLC, d/b/a New York Center for Rehabilitation Care and New York Center for Rehabilitation Care, Inc., d/b/a New York Center for Rehabilitation Care *and* 1199, New York's Health and Human Service Employees Union, Service Employees International Union, AFL-CIO. Case 29-CA-26678

July 29, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

Pursuant to a charge and an amended charge filed by the Union on December 13, 2004, and January 27, 2005, respectively, the General Counsel of the National Labor Relations Board issued a complaint on January 27, 2005, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 29-RC-9937. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and also asserting an affirmative defense.

On March 10, 2005, the General Counsel filed a petition to partially strike Respondent's answer and a Motion for Summary Judgment. Thereafter, on March 15, 2005, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On April 15, 2005, the Respondent filed an opposition to the motion for summary judgment.[1]

Ruling on Motion for Summary Judgment

The complaint alleges that on September 3, 2004,[2] following an election in which a majority of unit employees selected the Union as their collective-bargaining representative, the Union requested that the Respondent bargain collectively with it, and that since that date the Respondent has failed and refused to do so. In its answer, the Respondent admits all of the factual allegations in the complaint, except that it denies that the Union is the employees' exclusive bargaining representative, and it asserts the "statute of limitations" as an affirmative defense.[3] With respect to its denial of the allegation that the Union is the exclusive bargaining representative of the unit employees, the Respondent asserts that the Union's certification is invalid and, in support, raises arguments that were addressed by the Board in the underlying representation proceeding. With respect to its affirmative defense, the Respondent contends, in its opposition to summary judgment, that the charges filed in December are barred by Section 10(b) of the Act because the Respondent had advised the Union in May that it would test the Union's certification.

In agreement with the General Counsel, we find that neither the Respondent's raising of representation case issues, nor its assertion of a Section 10(b) defense, present factual issues warranting a hearing in this matter. With respect to the representation case issues, all such issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.[4] We therefore find that the

[1] On April 25, 2005, the General Counsel filed a motion to reject the Respondent's opposition to the motion for summary judgment. In its motion, the General Counsel contends that the Respondent's opposition should be rejected because it was improperly served on the parties. We find it unnecessary to pass on the General Counsel's motion. In finding that summary judgment is warranted in this case, we have assumed arguendo that the opposition was timely filed, and we have duly considered the arguments contained in the Respondent's filing. Thus, any ruling on the General Counsel's motion to reject would have no bearing on the outcome of this case.

[2] All dates hereafter are in 2004 unless otherwise stated.

[3] The Respondent additionally denies the allegation, contained in par. 2 of the complaint, that it is a domestic corporation with its principal office and place of business in Astoria, New York. The General Counsel has moved to strike this answer, noting that in the underlying representation proceeding the Respondent entered into a stipulated election agreement stating that it was a New York corporation located at the same Astoria, New York address that is set forth in the complaint. The General Counsel further notes in support that all of the documents delivered to the Respondent in this proceeding were received by the Respondent at the Astoria, New York address, and that the Respondent's answer to the complaint admits that it is an employer engaged in commerce within the meaning of the Act. We deny the General Counsel's motion to strike, but find that, in view of the above facts, the Respondent's answer to par. 2 of the complaint raises no issue warranting a hearing.

[4] We note that, on June 3, 2005, the Respondent submitted to the Board a May 13, 2005 decision of the United States District Court, Eastern District of New York that (a) denies motions for summary judgment in a WARN Act proceeding involving the Union and Lyden Care Center (which was found in the underlying representation pro-

Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

With respect to the Respondent's contention that the refusal to bargain allegation is beyond the 10(b) period, we find that this too does not raise an issue of material fact in this proceeding. The Respondent does not contend that the charge was filed more than 6 months after the Respondent's September 3 refusal to bargain. Rather, the Respondent contends that the charge is beyond the 10(b) period because it was filed more than 6 months after a May 2004 assertion by the Respondent to the Union that the Respondent would test certification. In the underlying representation proceeding, however, the Respondent filed objections to the March 11 election, the Regional Director issued a decision on May 20 overruling the objections and a certification of representative, and on August 19 the Board denied the Respondent's requests for review of the Regional Director's decision and certification. Thus, assuming the Respondent did, in fact, inform the Union in May of its intention to test the certification, this action would not have commenced the 10(b) period. Indeed, the 10(b) period could not start running prior to the Board's denial of the request for review on August 19, inasmuch as any charge alleging a refusal to bargain before the Board ruled on the request for review would not have been considered by the Board. Thus, the Section 10(b) period commenced on September 3, after the Board's denial of the request for review, when the Respondent refused the Union's request to bargain. Consequently, both the Union's December 13 charge and its January 27, 2005 amended charge were timely filed.

Accordingly, we shall grant the General Counsel's Motion for Summary Judgment and shall order the Respondent to bargain with the Union.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a domestic corporation with an office and place of business located at 2613 21st Street, Astoria, New York, has been engaged in providing health care and related services. Annually, the Respondent, in the course and conduct of its business operations, derives gross revenues valued in excess of $100,000, and purchases and receives at its Astoria facility, goods and materials valued in excess of $5000 from suppliers located within the State of New York, which suppliers, in turn, purchase and receive said goods and materials directly from suppliers located outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that 1199, New York's Health and Human Service Employees Union, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following an election held March 11, 2004, the Union was certified on May 20, 2004, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time certified nurses aides, housekeepers, maintenance employees, dietary employees and recreational employees employed by Respondent at its facility located at 2613 21st Street, Astoria, New York, excluding all office clerical employees, professional employees, guards and supervisors as defined in Section 2(11) of the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

On September 3, 2004, the Union requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of the unit, and since that date, the Respondent has failed and refused to do so. We find that this failure and refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after September 3, 2004, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and if an

---

ceeding to be a single employer with the Respondent); and (b) upholds an arbitrator's decision finding that Lyden Care Center violated a collective-bargaining agreement by refusing to provide certain employees with severance pay. We find no merit to the Respondent's contention that the court's decision precludes summary judgment in the instant matter, as the issues presented in that case do not raise any new material issues of fact relevant to the instant unfair labor practice allegations.

understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, New York Center for Rehabilitation Care, Astoria, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with 1199, New York's Health and Human Service Employees Union, Service Employees International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time certified nurses aides, housekeepers, maintenance employees, dietary employees and recreational employees employed by Respondent at its facility located at 2613 21st Street, Astoria, New York, excluding all office clerical employees, professional employees, guards and supervisors as defined in Section 2(11) of the Act.

(b) Within 14 days after service by the Region, post at its facility in Astoria, New York, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since September 3, 2004.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 29, 2005

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with 1199, New York's Health and Human Service Employees Union, Service Employees International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time certified nurses aides, housekeepers, maintenance employees, dietary employees and recreational employees employed by Respondent at its facility located at 2613 21st Street, Astoria, New York, excluding all office clerical employees, professional employees, guards and supervisors as defined in Section 2(11) of the Act.

NEW YORK CENTER FOR REHABILITATION CARE